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NO. 85-569

In the
Supreme Court of the United States

October Term, 1985

DRAVO BASIC MATERIALS COMPANY, INC.,
LOUISIANA MATERIALS COMPANY, INC.,
PONTCHARTRAIN MATERIALS CORPORATION,
Intervenors and Petitioners,

v.

STATE OF LOUISIANA, EX REL WILLIAM
J. GUSTE, JR., ATTORNEY GENERAL, ET AL,
Plaintiffs and Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I - *Introductory Statement*

The Petition for Writ of Certiorari was filed timely on October 2, 1985.[1] On October 31, 1985, Respondents[2] filed a brief in opposition. Although Respondents' arguments were largely anticipated and refuted in the Petition, Petitioners submit this short reply brief pursuant to Rule 22.5 to address certain issues raised for the first time in Respondents' brief in opposition.

II - *The Case is in a Proper Procedural Posture for Resolution by this Court.*

Respondents have urged that this case is inappropriate for the issuance of a writ of certiorari because no challenge to the validity of the "reasonableness" test was pressed before the Court of Appeals. Brief in Opposition, p. 5. That position is specious and illogical. At the time Respondents made their appeal to the Fifth Circuit, that court unequivocally applied the reasonableness test. *Save Our Wetlands, Inc. v. Sands*, 711 F.2d 634, *reh. den.*, 718 F.2d 1096 (5th Cir. 1983); *Save Our Ten Acres v. Kreger*, 472 F.2d 463 (5th Cir. 1973). The facts of the case supported the argument that the reasonableness test, as it then existed, had been satisfied. Petitioners' logical argument before the Fifth Circuit was that the district court had correctly applied the reasonableness standard (as it then applied in the circuit), and had reached the correct result.

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[1] Petitioners are Dravo Basic Materials Company, Inc., Pontchartrain Materials Corporation, and Louisiana Materials Company, Inc. *See* Petition for Writ of Certiorari, p. i.

[2] Respondents are the State of Louisiana, Save Our Coast, Inc., The Orleans Audubon Society, Sierra Club, Manchac Fisherman's Association, and Environmental Defense Fund.

Even more importantly, a major element of Petitioners' argument is that the Fifth Circuit went beyond its own reasonableness test, which had been applied by the district court, to devise its new "reasonableness plus" standard. Petition for Writ of Certiorari, p. 4. In so doing, it has effectively increased the split among the circuits by creating what amounts to a third standard. It would have been futile for Petitioners to attempt to dissuade the Fifth Circuit from applying its well settled reasonableness standard, and inappropriate for them even to try to do so considering that the district court, applying that standard, had held in their favor. In any event, it clearly would have been impossible for Petitioners to prophesy that the Fifth Circuit would confect a new test, much less to argue in advance against the imposition of that new test.

Additionally, Respondents argue that the present procedural posture of the case makes it inappropriate for review by this Court because the case was remanded to the district court by the Fifth Circuit. Brief in Opposition, pp. 6-8. However, certiorari may issue to review a judgment ordering a remand when the review of the order is "fundamental to the further conduct of the case." *United States v. General Motors Corp.*, 323 U.S. 373, 65 S. Ct. 357, 359, 89 L. Ed. 311 (1945); *see* also *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 36 S. Ct. 357, 358, 60 L. Ed. 713 (1916)[3]; *Forsyth v. City of Hammond*, 166 U.S. 506, 17 S. Ct. 665, 666, 41 L. Ed. 1095 (1897); Stern and Gressman, *Supreme Court Practice* §419, p.181. The issue presented by this Petition -- the correct threshold standard to be applied by the reviewing court -- is clearly of fundamental

[3]*Hanover Star Milling Co. v. Metcalf* was superseded on other grounds by statute as stated in *Foxtrap, Inc. v. Foxtrap, Inc.*, 671 F.2d. 636 (D.C. Cir. 1982) and in *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, ___ U.S. ___, 105 S. Ct. 658, 83 L. Ed. 2d 582 (1985).

importance to the outcome of the case, a point which is not disputed by Respondents. It is also important to the development of the law in this area, and could not be better presented for definitive resolution by this Court either later in this case or in another case. Hence, pursuant to the applicable jurisprudence, review by this Court at this time is clearly appropriate.

This case presents a classic example of when certiorari *should* issue: to resolve conflicts among the circuits as to fundamentally important questions of law. *United States v. General Motors Corp.*, 65 S. Ct. at 358; *Hanover Star*, 36 S. Ct. at 358. The conflict among the circuits as to the proper standard to be applied in determining the appropriateness of an agency decision not to require the preparation of an environmental impact statement is indisputable, despite Respondents' weak attempt to characterize the conflict as "illusory." Petition for Writ of Certiorari, pp. 4-10; Brief in Opposition, pp. 6, 11-12. The Fifth Circuit's ruling below not only reflects but actually exacerbates the split among the circuits, and further demonstrates the need for this Court to resolve the issue definitively.[4]

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[4]Even absent the particular circumstances of this case, the procedural objections raised by Respondents would not be a bar to this Court's review of the Fifth Circuit's ruling. "Although [the Supreme Court] do[es] not ordinarily consider questions not specifically passed upon by the lower court ... this rule is not inflexible, particularly in cases coming ... from the federal courts." *Capital Cities Cable, Inc. v. Crisp*, ___ U.S. ___, ___, 104 S. Ct. 2694, 2699, 81 L. Ed. 2d 580 (1984). This Court properly takes into consideration circumstances which justify the granting of certiorari on issues which were not pressed or passed upon in the lower courts. *Youakim v. Miller*, 425 U.S. 231, 234, 96 S. Ct. 1399, 1401, 47 L. Ed. 2d 701 (1976).

III - *The Ruling Below Creates a New, Onerous and Improper "Reasonableness Plus" Standard.*

The Respondents contend that the ruling below does not create a new "reasonableness plus" standard, but merely restates faithfully a "test applied by the Fifth Circuit . . . as far back as *Save Our Ten Acres v. Kreger, supra*, 472 F.2d at 465, 467 (5th Cir. 1973)." Respondents' Brief in Opposition, p. 9, n.7. That statement is both misleading and inaccurate. In *Save Our Ten Acres*, the Fifth Circuit first stated the reasonableness standard which it applied consistently thereafter until rendition of the opinion in this case:

> Under the review standard we hold is required, the court must determine whether the plaintiff has alleged facts which, if true, show that the recommended project would materially degrade any aspect of environmental quality . . .
>
> * * *
>
> Since [plaintiff] has raised substantial environmental issues concerning the proposed recommended project here, the court should proceed to examine and weigh the evidence of both the plaintiff and the agency to determine whether the agency reasonably concluded that the particular project would have no effects which would significantly degrade our environmental quality. . . . If the court concludes that no environmental factor would be significantly degraded by the project, [defendant's] determination not to file the

> impact statement should be upheld. On the other hand, if the court finds that the project may cause a significant degradation of some human environmental factor (even though other environmental factors are affected beneficially or not at all), the court should require the filing of an impact statement or grant [plaintiff] such other equitable relief as it deems appropriate.

Save Our Ten Acres, 472 F.2d at 466-67.

In this case, the district court accurately stated and applied the Fifth Circuit's reasonableness standard. *State of Louisiana v. Lee*, 596 F. Supp. 645, 651-52 (E.D. La. 1984); *see* also Petition for Writ of Certiorari, pp. A-24 through A-27. The Fifth Circuit clearly created a new and more onerous standard by holding that the district court's approach "subjected plaintiffs to an improper evidentiary burden," and by reformulating the "reasonable" test into a requirement that there be "no reasonable possibility" of environmental harm:

> Under *Save Our Ten Acres*, plaintiffs must establish only that the Corps was unreasonable in concluding that there was *no reasonable possibility* that the proposed action would significantly degrade any environmental factor (emphasis added).

State of Louisiana v. Lee, 758 F.2d 1081, 1085 (5th Cir. 1985); *see* also Petition for Writ of Certiorari, pp. A-7, A-8.

The ruling below clearly goes far beyond the reasonableness standard that had been applied previously by the Fifth Circuit, and which is applied by other circuits which follow the original reasonableness test.

IV - *There is a Genuine and Deep Conflict Among the Circuits, and that Conflict Ought to be Resolved by this Court.*

Without doubt the Respondents' most inventive argument is that the split among the circuits on the critical threshold question which forms the crux of this Petition is in fact "illusory rather than substantive." Brief in Opposition, pp. 6, 11-12. Sustaining this argument would require the Respondents to render clear language meaningless and to harmonize the irreconcilable.

Both this Court and the Fifth Circuit have recognized the serious conflict among the circuits, a fact conveniently ignored by Respondents. The Fifth Circuit has stated recently:

> An agency's decision to act without preparing an EIS is of course subject to judicial review. The circuits are, however, split on how that review should be conducted. In roughly half of the circuits that have decided the issue, a decision not to prepare an EIS will be overturned only if it is 'arbitrary and capricious.' Other circuits employ a 'reasonableness' standard of review. There are, moreover, considerable variations within these two general categories. [Citation omitted.] "This conflict is not merely semantic or academic.' *Gee v. Boyd*, ___ U.S. ___, 105 S. Ct. 2123, 2125, 85 L. Ed. 2d 487 (1985)(White, J., dissenting). [Footnote omitted.] In fact, three justices of the Supreme Court have recently argued that the full Court should review a case like this one to end the

> 'disarray' and 'confusion' that exists on this issue. *Id.* 105 S.Ct at 2126 (White, J., joined by Brennan, J. & Marshall, J., dissenting from denial of petition for writ of certiorari).

Fritiofson v. Alexander, 772 F.2d 1225, 1237 (5th Cir. 1985).

Circuit court opinions on the standard of judicial review of an agency decision to proceed with a major federal action without preparation of an EIS run the gamut. Some circuits have held the decision to be a fact-sensitive inquiry which should not be overturned unless manifestly arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[5] Other circuits have required the agency decision to be "reasonable."[6] The ruling below sets forth a third standard and requires "plaintiffs ... [to] establish *only* that the Corps was *unreasonable* in concluding there was *no reasonable possibility* that the proposed action would significantly degrade *any* environmental factor."[7] (Emphasis added). Respondents attempt to harmonize that range of opinion into a "common law of NEPA." Brief in Opposition, p. 14. Logically and legally it cannot be done. Respondents cannot deny (and do not

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[5] *Hanly v. Kleindienst*, 471 F.2d 823, 828-30 (2nd Cir. 1982), *cert. den.*, 412 U.S. 908, 93 S. Ct. 2290, 36 L. Ed. 2d 974 (1973).

[6] *Minnesota Public Interest Reseach Group v. Butz*, 498 F.2d 1314 (8th Cir. 1974); *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975); *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973).

[7] *State of Louisiana v. Lee*, 758 F.2d 1081, 1085 (5th Cir. 1985)(emphasis added); Petition for Writ of Certiorari, p. A-8.

attempt to deny) that the threshold decision whether to prepare an EIS is of fundamental importance, nor can it seriously be disputed that the approaches and answers to that question differ radically in the various circuits. Petition for Writ of Certiorari, pp. 4-10. The solution to that problem lies not in the creation of a wishful and imaginary common law of NEPA, but rather in this Court's definitive resolution of the issue.

V - *Conclusion*

For the foregoing reasons, and for the reasons set forth in their original Petition, Petitioners respectfully submit that a writ of certiorari should issue, and that the judgment of the Fifth Circuit should be reviewed and, after due proceedings, reversed.

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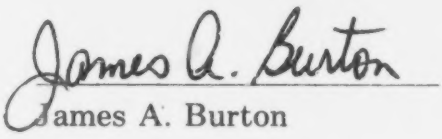
December 17, 1985

CERTIFICATE OF SERVICE

I certify that copies of the foregoing reply brief have been served by United States Mail, postage prepaid, on counsel of record for Respondents and all other parties as identified previously on the list filed pursuant to Rule 28..

New Orleans, Louisiana, December 17, 1985.



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